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EFFECT OF ADOPTION ON PRE-EXISTING RIGHTS.

[**Behari Lal** *v.* **Kailas Chandar,** (1896) 1 C. W. N. 121; **Birbhadra** *v.* **Kalpataru,** (1905) 1 C. L. J. 388; **Venkatanarasimha** *v.* **Rangayya Apparow,** (1905) I. L. R. 29 M. 437; **Dattatraya Sakhram** *v.* **Govind Sambhaji,** (1916) I. L. R. 40 B. 429.]

The Privy Council in dealing with the Medur case, avoided deciding the question, whether when a person is adopted, he is thereby divested of rights *already* acquired by him in properties belonging to his natural family. Judicial opinion in India is evenly divided upon the point. The earliest of the above cases (decided by Ameer Ali, J.) arose under the Dayabhaga law, but that circumstance seems to make no material difference in the decision of the question. The conflicting views may perhaps be conveniently described as dominated respectively by legal logic and textual authority. The text of Manu (IX, 142) is the starting point for the discussion and there has been some controversy not only as to its true interpretation but even as to its correct reading. The different considerations relating to this aspect of the question were so fully brought out in the evidence given in the Medur case by Mr. Sarkar Sastri and Mr. M. Rangachariar that we deem it desirable to place it before the profession substantially in its original form. We are aware that the Madras High Court held that their opinions were not admissible under the head of 'expert evidence,' there being no question of 'foreign' law—but we reproduce them as containing a full statement of the case for one side or the other, from the textual point of view.

The theory that adoption is analogous to 'Civil death' is based on a particular interpretation of Manu's text and it will be begging the question to assume that as the basis of the argument. It has also to be borne in mind that the analogy is in any view incomplete, for it has never been suggested that the adoption puts an end to the adoptee's rights or lets in the next heir, in respect of properties acquired by him *by his own exertions.* If on the other

hand, the text of Manu is held to be clear and express that the adoption not only affects his rights of future inheritance in the natural family but divests the adoptee of rights already acquired in the properties of the natural family, the argument founded on the assumed disfavour of the Hindu Law to the divesting of vested rights has little force in it. That such an operation may lead to anomalous or inconvenient consequences, especially in connection with the rights of alienees and of prospective heirs cannot be denied and this consideration seems to have weighed much with the Judicial Committee in *Kerri Kolitani's case* [1]. But such anomalies exist in other branches of the Hindu Law, *Cf.* for instance the effect of an adoption by a Hindu widow on alienations made by her (or by any co-parcener) prior to the adoption, and even as regards the present topic, it seems to be undisputed that the adoption will deprive the adoptee of his right by birth in the ancestral property of the natural family, though his right to a share therein was one that he could have even alienated, prior to the adoption.

Mr. GOLAP CHANDRA SARKAR SASTRI.

(*Examined on interrogatories*).

9. Please translate Manu, Chapter IX, Sloka 141, with the commentary of Medhatithi, and Sloka 142 with the commentaries thereon of Medatithi, Sarvagna Narayana, Kulluka, Raghavananda and Nandana.

Answer:—Manu, Chapter IX, Sloka 141. But if a person's *datrima* son (that is, given son) be endowed with all good qualities, he (the given son) certainly takes his (that person's) property, though received from a different *gotra*.

Commentary of Medhatithi:—In the text (of Manu, Chapter IX, Sloka 185), "neither brothers, nor fathers (that is, father or remoter ancestors) but sons take the father's property"—is predicated the right of all descriptions of sons to take the property (of the legal father); but where there is an *aurasa* son, their right to get maintenance only (is predicated) of the Kshetraja (appointed wife's son) and the like (secondary sons), in the text (of Manu, Chapter IX Sloka 163) "*aurasa* son alone is the master of the paternal wealth, but he must give maintenance to the other descriptions of sons, for the sake of compassion;" hence the right of the *datrima* son to take the property (of the adoptive

1. (1879) I. L. R. 5 C. 776.

father) is certainly established (by the text of Manu, Chapter IX, Sloka 185); but this text (Sloka 141) is intended to provide for (the adopted son's right to the adoptive father's property) even when an *aurasa* son exists; otherwise no purpose would be served by this text. But what is his share? On this some say equal to that of the *aurasa* (son) by reason of the absence (of specific deduction) of the twentieth part (for the eldest son, Manu, Chapter IX, Sloka 112). This is not reasonable, for if equality had been intended to be laid down, then just as in the topic of appointed daughter, so in this (topic of the given son) also, it would have been declared,—"then the division must be equal"—(Manu, Chapter IX, Sloka 134); hence it is asserted (by us) that an inference should be made, of the sixth or eighth or the like share as is provided for the appointed wife's son (Manu, Chapter IX, Sloka 164). As to this also (there) arises the observation (viz.) as a particular share is declared (by Manu for the appointed wife's son in the text—"but the sixth is the share of the appointed wife's son (Manu, Chapter IX, Sloka 164), so also a similar share will be declared for the *datrima* son (Manu, Chapter IX, Sloka 159); hence the necessity for the present text on the same subject should be considered. Upadhyaya, however, says,—"From the present text on the same subject and from the absence of any specification of any particular share, this inference is reasonable, that (the given son's share) is less than that of an appointed wife's son, but not absence of any share nor participation of an equal share (with the *aurasa* son), nor equality with the appointed wife's son."

Manu, Chapter IX, Sloka 142:—"The *datrima* son is not to take (with him when he passes from his family of birth to that of adoption) the *gotra* and the *riktha* of his progenitor, anywhere. *Pinda* is follower of *gotra* and *riktha*, (therefore), the *swadha* (spiritual food) goes away absolutely from the giver."

Medhatithi's Commentary:—(The reading "*tuktam*" in the first line of Medhatithi's comments on this text as given in Mandalik's edition of Manu appears to be incorrect. I think it should be "*yuktam*". For, as it is, the translation of the first sentence would be—"In this text also it is declared that the *datrima* son should get a share (of the adoptive father's property); and this must be wrong as it is not declared in the text. I proceed therefore to translate as if there was the word "*yuktam*")

From this (text) also it appears reasonable that the *datrima* son should get a share (of the adoptive father's property), inasmuch as he does not take away the *gotra* and the *riktha* from the progenitor's side by reason of his being gone away from the lineage; and in the absence of his taking the *gotra* and the *riktha* he does not also offer pinda to the progenitor; because the pinda is the follower of the gotra and the riktha, that is, follows the gotra and the riktha, by the gift of oblation of food and the libation of water he performs the exequial rite of him, whose gotra and riktha he takes; "goes away absolutely," that is, ceases with respect to him; (by the term swadha) are indicated "Sradha with offering of pinda" and the like means of offering spiritual food. Alike to it are these two (gotra and riktha, because these two also cease).; he who gives away his own son to another, with respect to him (the rite) ceases,—the meaning is, should not be performed in his honour. This very reasoning applies to the *kritrima* and the like subsidiary sons). The pregnant bride's son and the deserted son and (other) sons of two fathers confer benefit on both (the fathers). Others, however, explain that the word "haret" is to be deemed to have the suppressed causal form equivalent to "harayet." [The word 'harayat' in Mandlik's edition is erroneous, it should be harayet] and accordingly they say (the *datrima* son) should confer benefits on both the fathers as a son of two fathers. (This sentence as well as the rest of the commentary on this text are obscure. But if the word "gamayanti" be changed into "gamayati" then I think, I may decipher its meaning which is as follows). But the subsequent introduction of spiritual benefit (in the second line of the text) indicates the same (that is, the same meaning) in the way (we have put); —if the (adopted) son is not to take the gotra and the riktha, then, however, it must be explained (as we have done). (As regards the meaning put by others by taking "haret" to be equivalent to "harayet"); that, however, is not expressed (in the text), nor is there any proof which can be put forward in support of that other meaning.

Commentary of Sarvagna Narayana.—"Now the datrima son has not in any way connection with the property of the progenitor, —this is declared in the text beginning with *gotra* (that is, in the above text). For this very reason, he is not the son of two fathers, because, he is of the adopter's gotra. But the son begotten by

the husband's younger brother (on a woman according to the old custom of levirate) and the son of the appointed daughter are alone (sons of two fathers)—for they have two fathers. (Follower of Gotra and riktha),—the meaning is in case of identity of gotra and taking of riktha offering of pinda (takes place). Of him who gives his son (in adoption) the "swadha," that is, sraddha to be performed by that son, goes away.

Commentary of Kulluka:—"The dattaka son is never to get the gotra and the riktha connected with the progenitor, and pinda is follower of gotra and riktha, whosesoever gotra and riktha he takes, to him alone he gives pinda. Hence of the progenitor who gives away his son, the swadha, that is, the sraddha with pinda and the like to be performed by that son, ceases."

Commentary of Raghavananda:—There being a doubt whether the datrima son has a connection with his progenitor's gotra, riktha and pinda, or not; the text beginning with gotra (that is, the above text) is declared. "The gotra and the riktha," the word "riktha" here means wealth, (for) Amara, (the lexicographer) (says) "riktha and dhana and vasu are synonyms." These two he does not get, therefore pinda also offered by him does not reach the (natural) father. The reason for this (is) "pinda is follower of gotra and riktha" (that is) is on account of gotra and riktha; of the giver, that is, of the progenitor, the swadha ceases; the words "swadha" is illustrative—the purport is he is not entitled to all the three (*viz.*,) (the gotra, riktha and pinda). Govinda says—since it is declared,—"the ten sons are proclaimed in default of the aurasa and the kshetraja"—therefore the datrima son is entitled to property in default of these two. (But this is not correct), even when these two exist the datrima gets property; otherwise the special rule laid down in the text (141)—"But if a person's datrima son, &c.," would be useless. Therefore says Medhatithi—"But this text is intended to provide for (the datrima son's right to take the adopter's property)—even when an aurasa exist; otherwise, no purpose would be served by it."

Commentary of Nandana:—"The datrima son is not to get, that is, not to appropriate the gotra and the riktha of the progenitor; but he is to take the gotra and the riktha of him to whom he himself is given. The reason for this is declared by the latter half (of the text). "Follower of the gotra and the riktha,—

(what) follows the gotra and the riktha. The meaning is, he who takes the gotra and the riktha is also the giver of the pinda, none else. Hence of the giver, (that is) of the progenitor, the spiritual food (that is) the offering of the pinda, etc. ceases."

It should be observed that this text appears to be differently read by different commentators: Medhatithi appears to read the text with the word "haret," while Nandana with the word "bhajet". It is not, however, clear what reading the other commentators adopt. The word "dadatah" in the above text—I have translated into "from the giver", taking it to be in the ablative case, having regard to the commentary of Medhatithi; but Kulluka takes it to be in the genitive case: the form being the same in both these cases. I have not translated the words "gotra" and "riktha" because there are no English equivalents of them: for gotra means the descent through the father in unbroken male line from an ancient sage or rishi, after whom the gotra is named, or the status of being the son of the father, and riktha means property to which a person's right accrues by reason only of relationship to the owner, which is sometimes improperly translated into heritage. But under the Mithakshara the right of the male issue arises from their birth to the property of the father or other lineal male ancestor in the male line; such property cannot be called heritage; for *nemo est heres viventis*.

It may be observed here that my translation of the above text does not convey its full meaning and effect, which are to be gathered from other texts of that chapter bearing upon the subjects dealt with in this text. The object of this text is to show the change in the status of the boy given in adoption. It should be noticed that the text No. 168, Ch. IX, Manu, shews that a son may be given in adoption either by the father or the mother or both; and this text also applies in a case in which the giver is the mother. The progenitor also is to be taken as illustrative meaning not only the progenitor but also all persons connected through him. The provision relating to the cessation of connection with the progenitor's gotra implies that his relationship with all sagotra persons ceases. It is worthy of special notice that nothing is said by Manu about the connection with maternal relations. The reason appears to be that at Manu's time no importance was attached to cognate relationship. As the Twelve Tables of Rome, so the Code of Manu does not

recognise at all the heritable rights of cognates : nor is there any provision in Manu for offering pindas to maternal ancestors. The texts in which daughter's son and maternal grandfather are mentioned in connection with inheritance and performance of sradha ceremony relate to the putrika-putra or the appointed daughter's son, a kind of subsidiary son. In them the daughter's son occupies the position of either a son or a son's son and the maternal grandfather that of a father or paternal grandfather. The full meaning of this text read in the light of other texts in this chapter bearing on the subject of sonship is that adoption operates as civil death of the boy as regards the family of his birth by putting an end to all secular and spiritual connection of the boy with all natural relations.

10. Please translate also Smrithi Chandrika, Chapter X, paragraphs 12 to 15. Parasara Madhaviya, paragraph 63 beginning with *dattakadinam* etc., and ending with *dadatah*, etc., Dattaka Mimamsa, section VI, paragraphs 6, 7, and 8 and Dattaka Chandrika, S. II, paragraphs 18 & 19.

Answer:—" Hence the devolution of property from a secondary father in the Kali age (relates) only to the (secondary) son called dattaka. On this (subject) Manu (declares),—But of him whose *datrima* son is endowed with all goodqualities, (the son) is certainly to take his riktha though received from a different gotra. (Reading of this text (Manu Chapter IX, 141) is slightly different from that given in Mandalik's Edition, I am referring to the Calcutta Edition of the Smriti Chandrika by Pandit Bharat Chander Siromani, Professor of Smrithi in the Government Sanskrit College, Calcutta 1870. The Calcutta Edition contains "ahare-taib" instead of "saharetaib".) From the word "though" (it appears that the son takes) even when received from a person belonging to a different gotra. In this sloka the meaning of the third foot is thus explained by Devaswamin. " Is certainly to take his entire property and gotra ". Thus it is to be understood that by this very act creating paternity (of the adoptive father) the datrima son's ownership in the property of the adopter as well as the status of being of the same gotra with him, arise ; but it is to be understood that through the extinction of the filial relation from the gift in adoption the extinction of the ownership of the datrima son in the property of the giver and the extinction of the giver's gotra (lineage) take place. With this intention it is declared

by (Manu),—the datrima son is not to take the gotra and the riktha of the progenitor.

Parasara Madhavaiya, para. 63 :—The dattaka and the like do not take the riktha of the progenitor. This is declared by Manu in the text—" The datrima son is not to take the gotra and the riktha of the progenitor; pinda is follower of gotra and riktha; the swadha (spiritual food) goes away absolutely from the giver". [Manu's text, as quoted here, has "bhajet" instead of "haret": but the meaning is the same.]

Dattaka Mimamsa, paras. 6, 7 and 8, S. VI :—Manu declares also another rule, *viz.*—" The datrima son is not to take the gotra and the riktha of the progenitor, pinda is follower of gotra and riktha: the swadha (or spiritual food) goes away absolutely from the giver. The datrima son is not to get the progenitor's *gotra* and *riktha*; likewise *swadha*, that is, *sradha* performed by the son given goes away from the giver of the son; since *pinda* is follower of the *gotra* and *riktha*. The author of the (Smrithi) Chandrika (says):—" By this (text of Manu) is declared that by the very act creating filial relation, the datrima son's proprietary right in the adopter's property and the status of being of the same gotra with him, arise, but through the extinction of the filial relation from the very act of giving the extinction of the *datrima* son's proprietary right in the property of the giver and the extinction of the giver's *gotra*," take place.

Dattaka Chandrika, S. II, paras. 18 and 19 :—Likewise Manu (declares)—" The datrima son is not to take the *gotra* and *riktha* of the progenitor: *pinda* is follower of *gotra* and *riktha*; the *swadha* spiritual food goes away absolutely from the giver." By this (text) it is declared that through the cessation of the filial relation from the very act of giving, the cessation of the *datrima* son's proprietary right in the property of the giver and the cessation of the giver's gotra take place.

I have translated the word "nibritti" used in the Smrithi Chandrika, the Dattaka Mimamsa, and the Dattaka Chandrika into either "extinction" or "cessation".

11. Please read the translation of the slokas mentioned in question 9 above as given by Sir William Jones, Dr. Burnell and Dr. Buhler and of the passages mentioned in question 10 above as given by Mr. Krishnaswami Aiyar, Dr. Burnell and Dr. Sutherland.

Answer :—As regards Sir William Jones' translation of text No. 141 he has interpolated in his translation words which are not justified by the original text. He has not really translated the text but has construed it and has, in fact, given the meaning put upon the text by Kulluka. He has translated the word "haret" into "shall take" which appears to be misleading, if this phrase conveys the idea of futurity. The conjugation of Bidhiling in "hareta" only indicates an imperative rule but no tense. As regards Sir William Jones' translation of text No. 142, the word "claim" does not appear to be a correct rendering of the word "haret" or "bhajet"; nor are the words "family" and "estate" of "gotra" and "riktha."

As regards Dr. Buhler's translation of text No. 141, the words "shall take" for "hareta" are misleading, as has already been observed.

As regards his translation of text No. 142, the words "shall take" "family" and "estate" are open to objection, as has already been observed. As regards the word "never." I would prefer "nowhere" to it, since the original word "kwachit" primarily conveys the idea of place.

As regards Krishnaswami Iyer's translation of Smriti Chandrika. paras. 12 to 15, I find that in para. 13 he has adopted Sir William Jones' translation of text No. 141, Chapter IX, Manu, omitting the italicised words interpolated by Sir William Jones in his translation from Kulluka's commentary. And so also in para. 15 he has adopted Sir William Jones' translation of the first line of the text No. 142. And I have already stated my opinion with respect to the translation. As regards the last sentence of para. 13 the reading of the book from which he translated appears to be slightly different from the book I have. As regards para. 14, he has not correctly translated the most important part of it; but he only gives what he takes to be the sense of it in his own words. The last sentence of that paragraph, as translated by him, is misleading. The original says—"the cessation of datrima son's proprietary right in the property of the giver—" indicating the extinction of such right existing at the time of adoption. The difference will appear from a comparison of this translation with the literal translation given by me.

Mr. Sutherland in Section IV, para 6, Dattaka Mimamsa, has adopted Sir William Jones' translation of Manu, Chapter IX, 142,

with slight exception. I have already stated my objection to the words "claim", "family" and "estate". Mr. Sutherland has made use of these words in paras. 7 and 8 also.

In para. 18, Section II, Dattaka Chandrika, Mr. Sutherland translates Manu, Chapter IX Sloka 142, in the same manner as in the above passage of Dattaka Mimamsa. In this para. and in the next, the words "claim", "family" and "estate" have been used, and I have already stated my objection to them.

12. Would you accept the translations of all or any of these as correct? If so, state which of them you accept as correct?

Answer :—It is difficult to answer a question like this. I have translated the very same passages and have also given my opinion generally on these translations in answer to previous questions.

* * * *

Cross interrogatories.

4. Are there any words or phrases in these passages used in any peculiar or technical sense? If so, please state such words or phrases, what their ordinary meaning is and their peculiar or technical sense, if any, as used in these passages.

Answer :—The subject itself is a technical one and an ordinary student cannot understand—how can a person cease to be the son of his own father and of his own mother—how can he cease to be brother of his brother, cousin of his cousin—how can his relationship with all his real relations cease? There are many words in these passages used in a peculiar and technical sense. In text No. 141 and No. 142, Manu, Chapter IX, words "datrima", "hareta", and "haret", "riktha" "*gotra*", "*Janaitu*", "*pinda*", "*dadatah*" and "*swadha*" are used in technical senses.

"*Gotra*" primarily means that which protects cows:—Ordinarily the term *gotra* is understood to be the name of a *rishi* from whom a person is descended in an unbroken line of males,—but that meaning is to be taken subject to the fiction of adoption. Then again, it is said that none but Brahmins can have a *gotra* in the sense of being descended from the *rishi* after whom the *gotra* is called: in the case of the Kshatriyas and Vaisyas, it is said that their gotra means the name of some ancester of their Guru; but the Sudras cannot even have such a gotra as they cannot have a Guru or preceptor of the sacred literature, as the study of the shastras is absolutely prohibited to them. In Manu, Chapter IX, 141, the word "gotra"

means collectively all the persons descended in male lines from the founder of the natural father's gotra; the descent is to be taken to be either real or fictional as in the case of adoption; and in Manu, Chapter IX, 142, the word "gotra" means the status of sonship.

As regards the word "datrima" it means "given". None can understand the meaning of the word "datrima" by reading this text. In Manu Chapter VIII, Sloka 415, the word "datrima" means "a kind of slave". "Datrima son" has been defined by Manu in the subsequent text, No. 158, Chap. IX. Before reading that text, it is impossible to understand the meaning of words "datrima son" in texts Nos. 141 and 142. The word "hareta" or "haret" is derived from the root *hri*, which ordinarily means removing a thing without the consent of the owner, stealthily, for the purposes of appropriation. But verbs in Sanskrit are used in various different senses; for instance, from the root are derived the following words: ahar (taking food), "bihar" (walking for pleasure) prahar (beating), and samhar (killing); but the pervading idea appears to be that of removal of something. In the text No. 141 it means acquiring proprietary right (to the property of the adopter): the right is as it were removed from the adoptive father and brought to the adoptive son. Thus there is a connection between this meaning and the ordinary meaning. It may be that this root "hri" and the English word "heir" has some philological connection. It may sometimes be translated into inherit when it is connected with obstructed heritage or "Saprathi-bandha-daya." But in this text it cannot mean inherit, as the proprietary right is acquired from the moment of adoption. In text No. 142, the sentence is a negative one and it means—"is not to take away with him when he is passing from the family of his birth to the family of adoption." It appears that, according to the Laws of Manu, a man's status was determined by the gotra, the riktha and the pinda. He belonged to some gotra or other, he was entitled to some riktha from which he derived his maintenance and he had spiritual connection with some (deceased) persons to whom he offered pinda as being his ancestors. By declaring the cessation of secular and spiritual connection with natural relations indicated by gotra, riktha and pinda, it is intended that he becomes civilly dead to the family of his birth, and the subsequent texts Nos. 158 and 159, Chap. IX,

Manu, shew that the dattaka son acquires connection both secular and spiritual with the family of adoption, inasmuch as he becomes member of the adoptor's gotra, offers pinda to him and his ancestors and takes his property. The intention of the text No. 142 is to state the change that takes place in the status of the boy at the time of adoption. The word "riktha" ordinarily means wealth, but in the Smrithis dealing with the subject of daya-bhaga, it means property to which a person's proprietary right arises by reason only of his relationship to his owner. In some texts it means "aprati-bandha-daya", as in the text of Gautama cited in para 8, S. I, Chap. I, Colebrooke's Mitakshara and explained in para 13 of that section. In these two texts (Nos. 141 and 142, Ch. IX, Manu) it is used in the same sense. The text No. 141 contemplates acquisition of proprietary right to the adopter's riktha from the moment of adoption. And the text No. 142 contemplates that the boy is to lose the proprietary right he had acquired in the property of his natural father from the moment of his birth. The word "Janaitu" in the text No. 142, which means progenitor, includes all relations to whose property the boy might have acquired proprietary right as "apratibandha-daya" or "sapratibandha-daya" for instance, the paternal grand-father or the paternal uncle.

"Pinda" is ordinarily used in various senses other than that in which it is used here (text No. 142), namely, thickness, mass, ball, body, corridor of a house, morsel of food, &c. Here it means food offered to manes of ancestors; but it really stands for the exequial rites in which pinda in this sense is offered.

The word "dadatah" means the giver; but here it stands for all natural relations.

And "swadha", which means spiritual food, stands here for all exequial ceremonies. There are a few words in the commentaries, used in technical senses which need not be mentioned here.

5. (*a*) Does not the Sloka, Manu Chapter IX, 141, refer to partition between an after-born aurasa son and an adopted son?

(*b*) Does not the rikthaharnam mentioned in the said sloka refer to the taking of a share on partition?

Answer.—(*a*) There is nothing in the language of this text showing that it refers to such partition. But some of the commentators have held, having regard to other texts of Manu,

that this text should be construed to refer to a case in which a son is born to the adopter after adoption and consequently partition between the adopted and the begotton sons may take place.

(*b*) This question has been answered by my answer to 5 (*a*) above.

6. (*a*) Are there not two readings of the verb in the first Hemistich of Manu, Sloka Chapter IX, 142 ?

(*b*) Is not the word " Bhajet " in the reading of the said Sloka as quoted in your edition of the Viramitrodaya (page 52, cls. 11 and 12) ?

(*c*) Is your translation of the said sloka as given at page 124 of your edition of the Viramitrodaya, correct ?

(*d*) Is not the reading of the said verb as " Bhajet " accepted by the authors of the Mitakshara and other Nibandha Karas ?

Answer.—(*a*) Yes, some read " bhajet " instead of " haret."

(*b*) Yes.

(*c*) I did not translate the sloka myself, but adopted Colebrook's translation of it as given in his Mitakshara, Chapter I. S. 11, para. 32, subject however to the difference of reading and to the interpretation put upon it by the author of the Viramitrodaya. See preface to my translation of the Viramitrodaya, page XV. I cannot say that it is correct, for, the words " claim," " family " and " estate " are open to the objection already stated. The words " family " and " estate " do not convey accurately the meaning of the original words for which there are no equivalent words in English, and as the word " claim " is an inaccurate rendering of the word " haret."

(*d*) Yes, it is accepted by the author of the Mitakshara and the Parasara " Madhaviya " but not the authors of the Smrithi Chandrika, the Dattaka Mimasa, the Dattaka Chandrika and the Vivada Ratnakara who have adopted the reading " haret."

7. Is not the word " Bhajet " used in the sense of taking share, in Slokas 104, 119, 121, 124, 156, 192 and 200 of Manu IX ?

Answer :—In sloka 104, the word used is not " bhajet " but 'bhajerun " its plural form and bears the sense of division.

In sloka 119, the word means division.

In sloka 121, the word means division.

In sloka 124, the word " bhajerun " appears to mean "take"

In sloka 156, the word "bhajerun" means division.

In sloka 192 also it means partition.

In sloka 200 the word "bhajerun" means simply "taking", but it may also mean divide.

8. (*a*) In Manu IX, 124, are not the words "Bhajet" and "Haret" used synonymously?

(*b*) Does not Nandana in his commentary on Manu use "Haret" and "Bhajet" synonymously?

(*c*) Do not Kulluka Bhatta and the author of the Dattaka Chandrika use or understand the said words in the same sense?

Answer:—(*a*) Yes, in the sense of taking.

(*b*) It is difficult to answer this question without going through the entire commentary of Nandana.

(*c*) See answer to the previous question.

I fail to see the drift of these questions relating to the meanings of the words "bhajet" and "haret". I have already said that in Sanskrit verbs are used in various senses; for instance, this root "bhaja" means primarily a kind of connection between a thing and a person; "Bhakta" "Bhakti" and "Bhajana" are derived from it—meaning respectively devotee, devotion, and prayer; the word Bhaga or partition is also derived from it. The way in which this root has come to signify division is this: it means getting or being entitled to get or taking property, and when this word is connected with two or more persons, it means partition, as being jointly entitled to or jointly getting or jointly taking. And the particular meaning which is to be put upon such words depends upon the other words with which they are connected in the sentence. Because it signifies partition in some sentences, it does not follow that it bears the same sense in all sentences. Even if the reading be "bhajet", in the text No. 142 it can by no means signify divide, because, that meaning is inapplicable to gotra. Hence it must mean either "take" or "have connection with".

9. (*a*) What does the word "Haret" mean?

(*b*) Does it refer taking a share by partition or taking by inheritance, or both?

(*c*) Please translate Slokas 123 and 124 of Manu, Chapter IX.

(*d*) In what sense is the word "Haret" used in the said slokas?

(e) Is not "Haret" used in the sense of "taking on account of his share" in Manu, Chapter IX, 117, 123, 124 and 141?

Answer:—*(a)* Haret primarily means removing a thing without the consent of the owner for the purpose of appropriation. It has already been observed that the root of this verb is used in various senses. In text No. 141, it means "acquires proprietary right to." In text No. 142 it means "take away with him when he is passing from the family of his birth to the family of adoption at the time of adoption.

(b). No.

(c). Manu, Chapter IX, Sloka 123.

One born of the first wife is to take a bull as a specific deduction; the next best bulls other than that (shall be allotted) to those inferior to him on account of their mothers.

Do. Sloka 124.

But the eldest son born of the eldest wife is to take a bull and fifteen cows: then (other sons) are to take the rest according to their mothers: this is the settled rule.

(d) The word "haret" is used in the sense of taking.

(e) Texts Nos. 117, 123 and 124 contemplate partition—hence, what is taken must constitute a part or the share. In sloka 141 it cannot mean taking on account of share so far as the language of the text goes.

10. Does the word "Haret" refer to the future or the past?

Answer:—The conjugation called Bidhiling does not contemplate any time, but having regard to the fact that a Lawgiver lays down rules that are to apply to cases arising afterwards, it may be, as it has been, translated into "shall take". But the futurity thereby implied has reference to the time of promulgation of the law. Therefore, it means that whenever an adoption takes place in future that law will apply. But the term does not mean futurity relatively to the time of adoption. No importance is therefore to be attached to the future tense. It does not refer to the future or the past but to the present, that is to say, the time of adoption.

11. Is it "Nishedhavidhi" directed to a future act?

Answer.—This has been answered by my answer to the previous question.

13. *(a)* What does *Swatwam* occurring in verse 9, S. 6 of the Dattaka Mimamsa and in Dattaka Chandrika, S. 2, para. 19, mean?

(b) Does it not mean "a right to the wealth, &c.?"

Answer.—(a). "*Swatvam*" primarily means the quality of a thing which is owned by a person. It is a relative term. A thing becomes "Swa" in relation to a person who is its owner, and "Swatvam" is the quality of the thing importing that it is owned by the person. But it has acquired a secondary meaning, *viz.*, proprietary right or the relation between a thing and a person as property and proprietor. These two meanings are somewhat analogous to the two meanings of the English word 'property,' *viz.*, proprietary right and the thing which is the subject of the proprietary right. This word is correlative of "Swamitwa". It should be observed that three ideas must be present in the mind in order to understand fully the meaning of any of these words, *viz.*, "Swa", "Swamin", "Swatwam" or "Swamitwam", *viz.*, a thing and a person and the relation between them, that is the relation of property and proprietor. Each of these words denotes one idea and connotes the other two. The word "Swa" denotes the thing, the word "Swamin" denotes the person, and each of these words, 'Swatwam' and 'Swamitwam' denotes the relation. The two ideas other than what is denoted are connoted. The word "Swatwam" here (Dattaka Mimamsa, S. 6 para. 8, first sentence) means proprietary right or the relation of property and proprietor between the datrima and the adopter's property, and between the datrima and the giver's property in the second sentence. And in the Dattaka Chandrika S. 2, para. 19 also, it means the proprietary right.

(b). Yes, it means existing proprietary right in the giver's property.

* * * * *

Re-examination.

2. In what sense is the word "bhajet" used in Sloka 59, Chapter X; 70, Chapter IX and 9, Chapter IX, Manu?

Answer.—In Sloka 59, Chapter X, the word "bhajeta" means gets or derives, in Sloka 70, Chapter IX, the word "bhajeta" means have sexual intercourse with, in Sloka 9, of the same chapter, the word "bhajeta" bears the same meaning.

3. As the word "hareth" is used with reference to gotra and riktha in Sloka 142, Chapter IX, Manu, is there any rule that it should have the same signification with reference to riktha as with reference to gotra?

Answer.—Yes, it is the ordinary rule.

4. Do you find such a rule referred to in the Viramitrodaya, Chapter III, Part I, S. VIII, as well as in Mitakshara, Chapter II, S. I placita 33 and 34?

Answer.—In the Viramitrodaya there is a reference to such a rule; but not in the Mitakshara.

5. In Sloka 142, Chapter IX, Manu, can you understand the word "haret" to mean divide with reference to gotra.

Answer.—No.

6. Is it possible to understand the word "*haret*" in the sense of divide with reference to *riktha* alone in the compound word *gotra-riktha* governed by the same expression "*naharet*".

Answer.—No.

7. You said in reply to cross interrogatory, 6a, that there are two readings, *viz.*,—"haret" and "bhajet" in Chapter IX, Manu, Sloka 142; how do you account for the double reading in particular, and different readings in works in general?

Answer.—The difference of reading is to be accounted for by the practice among Pandits of committing to memory much of what they read and of quoting from memory while writing any work.

8. Assuming that the reading is "*bhajet*" and not "*haret*" in Sloka 142, Chapter IX, Manu, can it alter the sense when understood with reference to the *gotra-riktha*?

Answer.—No.

9. Can "bhajet" (assuming that to be the reading in Sloka 142, Chapter IX, Manu) mean divide when used with reference to gotra?

Answer.—No.

10. Can it then bear, having regard to the recognised rules of construction and interpretation, a different signification with reference to riktha alone in the compound word gotra-riktha?

Answer.—No.

11. What is the reason assigned in the second half of Sloka 142, Chapter IX, Manu, for the pinda going away from the giver?

Answer.—The reason is that inasmuch as the pinda can be offered only by one connected with the gotra and the riktha, and inasmuch as the adopted son ceases to be connected with the

natural father's gotra and riktha, therefore the adopted son ceases to offer pinda to the natural father and other natural relations.

12. Give the meaning of the word "Vyapaiti," having regard to the prefixes "vi" and "apa" added to "eti."

Answer.—I have already translated the word into "goes away absolutely."

13. What is meant by "paitrikum riktham" in Sloka 104, Chapter IX, Manu?

Answer.—Here it means the Estate left by the father.

14. In the above Sloka 104, Chapter IX, Manu, is that which was previously father's property spoken of as "paitrikam riktham" even after his death and descent to his sons?

Answer.—Yes.

15. What is that Sloka in Manu which deals with the cessation or extinction of all proprietary rights and ownership of the datrima son by reason of adoption, in the property of the natural relations?

Answer.—Manu, Chapter IX, Sloka 142, is the only Sloka on the subject.

16. Do the words "Janaitu-riktham" in the said Sloka 142, denote what is father's property or what was father's property, or both?

Answer.—The genitive case in the word "Janaitu" shows the connection of the progenitor with the words "gotra" and "riktha", the expression "Janaitu-riktham" therefore means wealth belonging to the father, whether he be dead or alive.

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19. When does a son born acquire the gotram of his father (the progenitor)? Answer.—From the time of his birth.

20. On adoption, does the boy retain or lose the gotram which has attached to him in his natural family and take the gotram of the adoptor?

Answer.—Before answering this question, I ought to state that the word "gotra" is often translated into "family" "or general family" meaning collectively all persons descended in unbroken lines of males from the Rishi after whom the gotra is named. But in the text No. 142, Chapter IX, Manu, it is used in the sense of sonship or lineage or the status of being the son.

By adoption, the sonship, lineage or the status of being the son of the progenitor ceases or becomes extinguished, and he acquires the gotram in the sense of sonship, lineage or the status of being the son of the adopter.

But the gotram in the other sense may remain unchanged when an adoption is made within the family.

21. As the existing gotra ceases by adoption, does also the existing proprietary right in the riktha of the progenitor cease?

Answer.—Yes, it does by virtue of the said text No. 142. Chapter IX, Manu.

SUMMARY OF ENGLISH CASES.

In re **R. S. Newman, Ltd., Raphael's claim**: (1916) 2 Ch. 309.

Salary and Commission —Distinction—Appointment for fixed term—Appointee to receive fixed salary and commission—Winding up of business before expiry of term—Appointee's right to damages for loss of salary and commission—Maintainability—Appointee getting a new appointment on same salary for rest of term—Effect.

Per *Astbury J.* A person employed by a company for a fixed term at a salary is entitled on its compulsory liquidation during that term to obtain such reasonable damages as he is likely to suffer having regard to his chances of getting other employment. But, where before the expiry of the term, he obtains a new employment carrying the same salary and lasting for the rest of the term, and he is paid his salary up to the time he obtains his new employment, he is not entitled to any damages for loss of salary.

Per *Astbury J,* and the Court of Appeal: There is a distinction between the position of a man who is to be paid by a fixed salary and that of a man who is to be paid by a commission. As a general rule no claim can be made for the non-receipt of commission unless the failure to earn the commission has been caused by the wilful Act of the other party. Where, therefore, a person was appointed managing director of a company for a fixed term under an agreement by which he was to receive 5 £ a week by way of salary and he was also entitled to a commission of 5% on gross sales, and before the expiry of the term fixed, the company was wound up by the Court and there was no business upon

which that commission could be earned after the date of the winding up, *held* that the managing director was not entitled to damages for loss of commission.

Catesby v. Burnett: (1916) 2 Ch. 325.

Company—Articles of Association — Construction — Day of election of directors—No election on date fixed—Adjournment of meeting—Adjourned date, date fixed for election within meaning of article.

One of the articles of association of a limited company provided that a member should not be qualified to be elected a director unless written notice of the intention in that behalf was given to the company not less than 14 clear days before the *day of election of directors*. The ordinary general meeting of the company was held on December 10, 1915. Though the meeting of that date was summoned for the purpose, *inter alia*, of electing directors in place of those who were retiring, the election was not proceeded with on that day, but a committee of share-holders was appointed to investigate the affairs of the company and report to a general meeting to be held on March 10, 1916. On February 21, 1916, written notice was given to the company by a share-holder stating that at the adjourned meeting he proposed to move the election of 4 named members as directors. On a question arising as to whether such notice was in compliance with the article above referred to, *held* that it was as the day of election of directors within the meaning of that article was, in the circumstances of the case, not December 10, 1915, the date originally fixed, but March 10, 1916.

In re **Timson Smiles** *v.* **Timson**: (1916) 2 Ch. 368 C. A.

Will — Construction — Principle —" Issue "—" Parent "— Meaning.

Under a bequest of a residuary estate subject to a life interest to five named nephews and nieces with a direction that if any of them should die in the lifetime of the tenant for life leaving lawful " issue," such issue to take the share which his, her, or their deceased " parent " would have taken it living, while, if any of them should die in the lifetime of the tenant for life without leaving " issue " him or her surviving the share of the one so dying

should be divided amongst the survivor or survivors and the "issue" of him, her, or them so dying and leaving issue, *held* that the word "issue" was confined to children.

In re **Smith Prada Vandroy**: (1916) 2 Ch. 368 C. A.

Will—Construction—Principle—"this my will"—Meaning—Instrument called will or testamentary disposition of testator constituted by his will and codicils at date of his death—Tests.

The word "will" has two meanings. In one sense it means all the testamentary documents by which the testator's property is disposed of; another meaning is that it is an instrument called a will irrespective of any codicils which may subsequently be made. All the circumstances of the case should be taken into consideration in deciding which meaning the word has in any particular case. *Held*, that, in the circumstances the expression "this my will" in a will referred not to the particular instrument but to the testamentary disposition constituted by the will and codicils at the date of the death of the testatrix.

Barnett v. Javeri & Co.: (1916) 2 K. B. 390.

Contract—"Sale of goods"—Contract "subject to safe arrival"—No specification of ship by which goods to be carried—Seller's liability—Distinction between such case and one in which ship specified.

Under a contract for the sale "subject to safe arrival" of goods expected to arrive by ship from a foreign country, no particular steamer however being named, the obligation of the seller is to ship the goods or to get them so far under his control that they are put on board some ship or other. The expression "subject to safe arrival" covers only accidents occurring in transit. There is a fundamental difference between such a contract and one which refers to the arrival of goods by a particular steamer.

Where the defendant, who had made a contract for the delivery to himself of certain goods expected by his vendor to arrive from Alexandria, entered into a contract with the plaintiff for the sale to him of the said goods "subject to safe arrival," no ship however being named in the contract as that by which the goods were to arrive; *held*, in an action for damages for non-delivery of the goods, that the defendant was liable as the goods had not been even shipped.

JOTTINGS AND CUTTINGS.

Another legal story.—On circuit at Jedburgh, a counsel rather given to grandiloquence had emphasised a point by telling the jury he pledged his professional reputation on it. At the next town, he was loudly repeating the same pledge when the Lord Justice-Clerk Inglis said drily, "I am afraid, Mr.—, the article you mention is already in pawn at Jedburgh!"—*The Law Students' Journal, November 1, 1916.*

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Lord Moncrieff, though an upright and learned judge, had what Lord Cockburn called "a great inferiority of general knowledge." He did not know even such a simple thing as that gas was conducted to the burners through pipes from a distance. During the trial of an engine driver, in the early days of railways, a fireman witness stated that the prisoner duly whistled on approaching the crossing where the victim was run over and killed. How loud did he whistle? he was asked. "Loud enough to be heard more than half a mile off," replied the witness. "Cockburn did you hear that?" asked Moncrieff, shocked: "Whistling loud enough to be heard half a mile off—the man's perjured!" Cockburn explained that the witness did not mean whistling with his mouth: "they do it with a whistling machine." "I never heard of such a thing!" exclaimed Moncrieff, and then suspecting he was making himself look foolish, he added sulkily, "I'll tell you what it is, Cockburn, ye're most abominably rash to say such a thing!"—*The Law Students' Journal, November 1, 1916.*

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Neutrals and Mediation.—The business of the international lawyer differs very much from that of the politician. The former is concerned simply with the statement of what is, or is not, the law, without fear or favour; the latter must necessarily be guided by considerations of expediency, which may sometimes be dictated by pure sentiment. Looked at from this point of view, the now famous interview in which the Secretary of State for War declared that 'any move in the direction of peace from the United States, the Vatican, or any other neutral would be regarded by this country as an unneutral act,' can be regarded, in its proper light, as a purely political statement. International lawyers, like, Lord Bryce for instance, cannot be expected to assent to the general principle underlying Mr. Lloyd George's

words, that a belligerent may regard an offer of mediation by a neutral as a breach of neutrality according to the time and circumstances under which it is offered. An act cannot become unneutral merely by saying that it is so. International law, in the present case, quite explicitly regulates the rights and duties of the parties concerned. For the Hague Convention on the Pacific Settlement of International Disputes (to which Great Britain and the United States are both parties) provides that a neutral State may offer mediation at any stage in a war, and that such an offer cannot be regarded by any of the belligerents as a breach of neutrality. It is, therefore, not in the power of this or any other country to treat an offer of mediation, if and when it comes, as an unneutral or unfriendly act; for the simple reason that the written and contractual law of nations has given to neutral States a vested and indefeasible right which can no more be taken away by unilateral statements that it does not exist than their right to the inviolability of their territory can be taken away, according to the German method, by simply ignoring or denying it.—*The Law Journal, 7th October, 1916.*

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The Art of Cross-examination.—Time was, no doubt, when the art of cross-examination was less understood at the Bar than it is now. 'You seem to think that the art of cross-examining is to examine crossly,' Baron Alderson remarked to an advocate who was cross-examining with more vigour than skill. The older generation of advocates often proceeded on the assumption that the intimidation of the witness was a short cut to the elucidation of the truth. Even at the Parliamentary Bar, to Judge from Mr. Balfour Browne's recent volume of reminiscences, there were advocates who sometimes forgot that they were gentlemen. Mr. Thomas Hawksley, a distinguished Engineer was being cross-examined by Mr. Merryweather, Q. C.

Mr. Hawksley's face, a clever little face with a clear brow, was drawn to one side whether from an accident or as a congenital conformity I do not know. While he was being cross-examined by Mr. Merryweather [*sic*] he dropped some words which did not reach counsel. 'What was that you said, Mr. Hawksley?' he asked. 'It was not intended for you, Mr. Merry.weather,' said the witness. 'No,' said Merryweather, 'I could see it was said aside.

That was not merely, as Mr. Balfour Browne is content to call it, cruel; it was abominable. The foremost exponents of the cross-examiner's art have usually recognised that courtesy is far more effective than bullying. Of the famous Scarlett it has

been written that 'he would take those he had to examine, as it were, by the hand, make them his friends, enter into conversation with them, encourage them to tell him what would best answer his purpose, and thus secured a victory without appearing to commence a conflict.' The superiority of Scarlett's methods has come generally to be recognised. Sir John Hollams, in his 'Jottings of an old Solicitor,' tells an interesting story of two women. 'fashionably dressed' and 'very intelligent,' who fraudulently obtained a bill of lading. Bovill, who 'had not the reputation of being a severe cross-examiner, made nothing of one of the two women,' but Ballantine, who was the second counsel for the plaintiffs, 'proceeded to cross-examine the other claimant in a very different manner, and with great severity,' transfixing her with an almost fierce gaze.

> The effect of the cross-examination was marvellous, for in less than a quarter of an hour she fell down flat in the witness-box and could not be further questioned. The result was greatly to prejudice Chief Justice Erle, who, in summing up, said they had witnessed an exhibition of brute force which he had never before seen in a Court of Justice, and hoped never again to witness. In the result the plaintiffs had the verdict, but it was without doubt jeopardised by the extreme severity of the cross-examination.

There, in truth, lies the explanation why, apart from higher considerations, browbeating does not pay. Every jury-box contains twelve possible witnesses at other trials, and they are quick, especially in these days, to resent any unfair use of the cross-examiner's powers.—*The Law Journal, 7th October, 1916.*

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Ill-temper in the Witness-box.—Some twenty five years ago, as the result of Sir Charles Russell's handing of one of the witnesses in the famous *Osborne* case, a loud outcry was raised against what was called 'the abuse of cross-examination.' A long discussion in the *Times*, in which aggrieved witnesses clamoured for protection from their forensic tormentors, was relieved by a lively contribution from Sir Frank Lockwood, narrating an experience of his own in cross-examining a witness at the York Assizes as to the exact position of certain cattle on a road—'beasts' as they call them in Yorkshire. 'Now, my man,' said Lockwood, 'you say you saw these animals clearly from where you stood; how far off can you usually see a beast?' The witness, looking critically at Lockwood across the court, replied, 'Just about as far off as I am from you.' Sir Frank Lockwood's numerous suggestions that advocates stood urgently in need of

protection from witnesses would acquire a more serious turn if the experience of a defending solicitor in a lighting prosecution at Bath on Monday became at all frequent. The charge was made against the manager of one hotel, and the chief witness was a visitor at another. When the defending solicitor asked the titled witness, who is described as 'the Acting Commander of the Royal Naval Reserve and Chief Examining Officer in the Bristol Channel,' whether he had not had a dispute at the hotel against which he was giving evidence, the irate gentleman called him 'a—rascal,' and 'a shirker who ought to be in khaki instead of defending trivial cases,' and when, in reply to this, outburst, the solicitor quietly remarked that he had served the King for seven years, the unappeased witness saw fit to add, 'Yes, as a Volunteer or a dodging special, I expect.' Whether the question that excited the angry passions of the witness was a justifiable one or not we have no means of judging. There is certainly nothing on the face of it to excuse so violent and vulgar a display of ill-temper. The agitated witness even contemplated a physical encounter with the cross-examining solicitor. 'If this had occurred outside I would have boxed your ears,' haughtily remarked the 'Acting Commander of the Royal Naval Reserve and Chief Examining Officer in the Bristol Channel.' Since this exhibition does not appear to have produced any reproof from the magistrates in whose presence it was made some measures ought to be taken to indicate that even gentlemen entrusted with important military duties are not entitled, no matter in what capacity they enter the witness-box, to attempt to browbeat even the humblest 'officer of the Court' in the performance of his duty to his client. One would have said that such language was unknown in an English Court of justice were it not for the recent altercations in Mr. Justice Eve's court. Can it be that the fiery witness in Bath Police Court has been making a special study of those unhappy incidents in the Court of Chancery? The sooner they receive some authoritative censure the better.—*The Law Journal, October 7th* 1916.

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The Retirement of Lord Justice Phillimore.—With the reopening of the Courts have come a number of judicial changes not wholly unexpected. By the retirement of Lord Justice Phillimore, who has occupied a seat on the Bench for nearly nineteen years, the Court of Appeal loses one of its most learned

and experienced members. Few judges in recent times have possessed a larger or more varied store of legal learning. At the Bar he acquired a leading practice in Admiralty and Ecclesiastical cases; on the Bench, before his promotion to the Court of Appeal three years ago, he was the Judge in Bankruptcy, in addition to taking a successful part in the ordinary work of the King's Bench Courts. He has taken, too, a zealous interest in the work of the International Law Association, and has materially helped to maintain for England a leading place in the still uncertain science of the Law of Nations. The profession while sincerely regretting the passing of so scholarly and courteous a judge from the Royal Courts of Justice, will hope that he will be afforded the opportunity of continuing his judicial work in a higher sphere.—*The Law Journal. October 14, 1916.*

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Submarines and International Law.— The activities of German submarines off the American coast promise to give rise to an important controversy as to the blockade of neutrals. The Allied Note to neutral States regarding the treatment of submarines in respect of their use of neutral waters is, as it frankly confesses, an invitation to neutrals to accept certain new propositions of law, rather than any declaration of existing law. In effect, it lays down the principle that a submarine is subject to no accepted rules, but is a thing entirely *sui generis*, for which special rules must be made. The accepted principles of neutrality, whereby a belligerent warship is allowed certain facilities for a certain period in neutral ports, subject to the governing idea that the neutral territorial waters must not be made a base of operations in violation of neutrality, is, it is argued, inapplicable to submarines, which, by reason of their elusive nature, are incapable of classification as belligerent warships. Neutral States are accordingly invited to cease to treat them on that footing. The objection which occurs to the international lawer is that this is an extremely two-edged and dangerous argument. It has hitherto formed the basis of the German case for the destruction of vessels at sight. They argued that a submarine was a thing *sui generis*, a new departure in war, and that, therefore, the ordinary rules of visit and search were inapplicable to it. If once the doctrine of *sui generis* is admitted into the law of war, it is obvious that the door is at once opened for the commission of every conceivable llegality. Fortunately, perhaps, for our position in the present

controversy, the American Government has not adopted the view pressed upon it by the Allied Note; so that we are free to deal with the new threat of submarine 'frightfulness' on the old and well-settled lines. On the whole, it seems the safer and the sounder course to continue to insist upon the necessity for the submarine conforming in all ways to the accepted rules of maritime warfare. Only in this way can any adequate check and safeguard be imposed upon its activities.—*The Law Journal, October 14, 1916.*

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Zeppelins as Deodands.—In times which are not so very remote—up to the early Victorian period, in fact—any chattel which was found by the presentment of a jury to be the immediate cause of the death of a person, either by accident or by homicide, was held to be forfeited to the Crown, to be applied as a Deodand to pious uses. This was a branch of the Crown's ordinary revenue consisting of forfeitures for offences, the true reason for such forfeitures, according to Blackstone, being the breach of the social contract under which civil rights are conferred upon individuals in exchange for that degree of actual freedom which every man must sacrifice when he enters into the community. 'If, therefore,' says the great commentator, 'a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privilege as he claims by that contract; and the State may very justly resume that portion of property, or any part of it, which the laws have before assigned to him.' Deodands, it is true, arose from the misfortune rather than the crime of the owner, but they had a sanction older and superior to the *contrat social*, that of holy Church, which founding itself on the Biblical law, 'If an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten' (Exodus xxi., 28), claimed all things so forfeited to the Crown to be applied to pious uses and distributed by the high almoner. In course of time these, with other forfeitures, came to be considered as royal franchises, which were granted out to lords of manors 'to the perversion,' as Blackstone says, 'of their original design,' and the odium which attached to the carrying out of the law in this form caused it to be abolished by the statute 9 and 10 Vic., c. 62, which enacted that from the 1st September, 1846, there should be no forfeiture of any chattel 'in respect of the same having moved to or caused the death of

man.' Although, therefore, it is not as deodands that the fallen Zeppelins, with all their appurtenances, can be claimed by the Crown, but rather as enemy property which is liable to forfeiture wherever found, there is a considerable approximation to the original idea in the use which it is proposed to make of a large part of the fabric of the last captured monster. By devoting these Zeppelin relics to the pious use of the Red Cross Fund in the great collection to be made on 'Our Day,' a great charitable as well as national purpose will be served. And so the earlier ideas of the Deodand, the 'gift to God,' find in this new application of the enemy's goods their most appropriate development. *The Law Journal, October 14, 1916.*

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The Non-attendance of Counsel.—Complaint has again been made from the Bench of the non-attendance of counsel in cases in which they have been briefed. In two cases before the Divisional Court on Tuesday the counsel to whom the briefs had been delivered did not appear, and the counsel into whose hands the briefs had at the last moment been put felt themselves unable to address the Court. The Lord Chief Justice did well to censure a practice at once disrespectful to the court and injurious to clients. No member of the Bar, of course, can be in two places at once, but he usually knows when conflicting calls will be made upon his services, and the obvious course for him is to hand over one of his briefs to another barrister in time to enable him to do justice to the client's cause. There are very few members of the Bar who have not fellow practitioners in their own chambers who, provided they are given the necessary time for preparation, are quite capable of conducting the cases to which they themselves are unable to attend. What too many barristers are inclined to do is to keep their briefs in their own hands until the very last moment, hoping that the Court will grant an adjournment. Cases not infrequently occur in which the Court is not unwilling, in order to serve the interests of clients; as well as to suit the convenience of counsel, to adopt that course. The convenient practice has, however, its limits, and counsel do much to imperil its continuance if, in cases in which they can easily entrust their briefs to other members of the Bar, they fail in their obvious duty to do so in good time.—*The Law Journal, October 21, 1916.*

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The Return of Fees.—There is a popular notion that a member of the Bar never returns his fees, even though, in the

words of Gilbert, he 'hasn't been there to attend to the case.' The erroneous notion has again found expression in connection with the Lord Chief Justice's recent protest against the absence of counsel. Lord Eldon, in his 'Memoirs,' refers to two eminent members of the Northern Circuit who, having fixed a consultation late at night, were quite incapable of holding it because they had dined too well at 'Lawyer Fawcett's hospitable table. Young Scott, who was briefed with them, was ordered to make an early departure from the generous board to make himself acquainted with the facts of the case.

This was hard upon me; but I did go, and there was an attorney from Cumberland, and one from Northumberland, and I do not know how many other persons. Pretty late, in came Jack Lee, as drunk as he could be. 'I cannot consult to-night; I must go to bed,' he exclaimed, and away he went. Then came Sir Thomas Davenport. 'We cannot have a consultation to-night,' shouted Davenport. 'Don't you see how drunk Mr. Scott is? It is impossible to consult.' Poor me! who had scarce had any dinner and lost all my wine—I was so drunk I could not consult! Well, a verdict was given against us, and it was all owing to Lawyer Fawcett's dinner. We moved for a new trial, and I must say, for the honour of the Bar, that these two gentlemen, Jack Lee and Sir Thomas Davenport, paid all the expenses between them of the first trial. It is the only instance I ever knew; but they did.

That is very interesting, not only as a picture of social life in the time of Geoge IV.—it is quoted, indeed by Thackeray in his famous lecture on that monarch—but also as an instance of the advocate's sense of responsibility. Another instance, more directly in point, is afforded by Mr. Atlay's sketch in his 'Victorian Chancellors' of Lord Halsbury's career:—

His last appearance in Court at the Old Bailey was in November, 1884, under curious circumstances. He had acted as counsel in a probate action arising out of the testamentary dispositions of an eccentric citizen of Leominster. His clients were not only unsuccessful, but were committed for trial on a charge of perjury. Rightly or wrongly, Sir Hardinge Giffard believed that he had not done them full justice in the hearing before Sir James Hannen, and he insisted upon defending them, devoting to the task his whole time and attention during a trial which lasted eight days, and eventually returning his fees.

Upon the death of Mr. Justice Walton a solicitor, in paying a tribute to his memory, mentioned that the late judge had voluntarily returned his fees in an action in which he had briefed him because 'he was not able to give that attention to the case which he thought he might have given.' Sir Edward Clarke and other distinguished leaders of the Bar have, it is well known, made it a rule to return their fees when they have been unable to attend. Not, of course, that there is anything very meritorious in this return of fees which have not been earned. The Bar

Council have, indeed, laid it down as a rule of professional etiquette that a barrister who accepts a brief upon an express understanding that he will personally attend throughout the case ought, if he does not so attend, to return his fee.—*The Law Journal October 28, 1916.*

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Juniors and the Bench.—The compliment which the Lord Chancellor has paid to the Junior Bar by the elevation of Mr. McCardie to the Bench has had no parallel since Lords Selborne made Mr. J. C. Mathew a judge in 1881. Treasury 'devils' have, of course, received their customary reward in the interval in the persons of Mr. A. L. Smith, Mr. R. S. Wright, Mr. Henry Sutton, and Mr. S. A. T. Rowlatt on the Common Law side, and Mr. James Stirling, Mr. Ingle Joyce, Mr. R. J. Parker, and Mr. C. H. Sargant on the Chancery side; but no stuffgownsman of the non-official kind has been deemed worthy of such high preferment. Yet in the not remote past juniors have not infrequently been invited te leap over the heads of the Inner Bar, and, more often than not, with most satisfactory results, so for as the public service was concerned.

The first of the group in the records of the past hundred years is George Sowley Holroyd, declared by his contemporaries to have been 'born with a genius for law.' Lord Eldon made him a Judge of the King's Bench in 1816, and he subsequently shone during twelve years of office as the colleague of Lord Tenterden, C. J. (who himself had never worn a silk gown) Bayley, J., and Littledale, J. He was in his day as great an instructor of legal youth as Tidd or Thomas Chitty, and could point to a roll of forty-seven pupils, with three judges (Hullock, B., Bolland, B., and Cresswell, J.) amongst them. Less distinguished as a judge was George Wood, Baron of the Exchequer from 1807 to 1823, who also owed his promotion to the favour of Lord Eldon. Like Holroyd, J., he had a well-filled pupil room, and taught the mysteries of special pleading to one Lord Chancellor and two Chief Justices—Lords Erskine, Ellenborough, and Tenterden. Beginning his Judicial career at the mature age of sixty-seven, he sat on the Bench for sixteen years. Baron Alderson, Judge of the Common Pleas in 1830 and a Baron of the Exchequer in 1834, was, on the other hand, an infant prodigy; he was only forty-three when Lord Lyndhurst invited him to be the fifth Judge of the Common Pleas. There

was no more learned lawyer in early Victorian times, and he was a poet and humorist to boot.

Bolland, B., had worn his stuff-gown for twenty-eight years when he succeeded Hullock, B., in 1829. Lord Lyndhurst, who was his patron, had been his friend at Trinity College, Cambridge; and Bolland is said to have owed his judgeship rather to this happy chance than to his professional merits. His bust in the library of Trinity College reminds the present generation of his literary tastes, but his judgments are unquoted. Crompton, J., took the place of a promoted 'devil'—Patteson, J. —in 1852. A reporter, like his brother Alderson, he had held also the extinct offices of Tubman and Postman in the Court of Exchequer. James Shaw Willes, appointed a Judge in 1851, was singular in coming to the Bench when there was no Lord Chancellor in existence. The Great Seal was in the hands of Lord Langdale, M. R., Shadwell, V. C., and Rolfe, B., as Commissioners. Forty-seven years of age at the time, he had won fame as editor of 'Smith's Leading Cases,' and had been chosen, by reason of his great erudition and experience, as one of the Common Law Commissioners.

Blackburn, J., afterwards eminent as a Lord of Appeal in Ordinary, was picked out by his countryman, Lord Campbell, in 1859. For the outcry from the Bar and the public which ensued there was, as events showed, no justification. When Mr. James Parke was chosen to succeed Holroyd, J., in 1828 there were, however, no complaints. Yet he had been but fifteen years at the Bar. For twenty-eight years he continued to adorn the pages of Meeson & Welsby, and he was the occasion, on his retirement, for establishing the legal proposition that the Crown by desuetude had lost its power to create life peers. His blood flows in the veins of his grandson, Mr. Justice Ridley. And another ancestor of a future judge who secured the honour of 'silk' was Edward Vaughan Williams (son of the 'divine Serjeant' and father of the Lord-Justice of our own era), Judge of the Common Pleas from 1846 to 1865. Williams, J., was of 'undeniable integrity as a citizen' and had a 'well-deserved reputation as a profound lawyer.' So said the congratulating burgesses of Kidwelly, whose Recorder he was at the time of his elevation. And Sir Roland Vaughan Williams narrowly escaped the fate of his father. A silk gown was thrust upon him

by Lord Halsbury, so that he might serve as Commissioner of Assize a few months before he was promoted. Lord Tenterden, C. J., Richardson, J., Littledale, J., Patteson, J., Wightman, J., Archibald, J., Hannen, J., and Bowen, J., were all stuff-gownsmen who had served Law Officers as 'devils.' These are good names, but a list which includes Alderson, Willes, and Blackburn can compare with any other roll of fame.—*The Law Journal 28th October, 1916*.

CONTEMPORARY LEGAL LITERATURE.

Insurance of enemy property against the acts of the Government of the insurer was for a long time considered not illegal. Lord Mansfield thought it was for the benefit of the country to uphold such contracts. First, he said, it brought in profit to the country in the shape of premiums, secondly, it was a certain mode of obtaining intelligence of enemy designs. This however is no longer the law but the question is still undecided whether a pre-war valid contract of insurance is wholly avoided by the war or is only suspended and any right accruing after the cessation of the war could be enforced and the learned writer in the *Law Quarterly Review for October* on this subject suggests that the latter is the correct view. Another writer in the same Review puts forward the view that under the common law the Crown has power for emergencies of State to seize property of the subjects and that no claim for compensation therefore is admissible against it or its officers. The majority in the court of appeal apparently took this view but as Sir Frederick Pollock observes that the course that the Attorney-General took in the House of Lords of offering compensation suggests that it may not have equally appealed to the House. The argument of the learned writer is that the restrictions placed on the Crown's prerogative as to maintaining a standing army, etc., relate only to peace times and do not cut down the Crown's right to take all necessary steps to protect the country in times of war. No petition of right for compensation would lie against the Crown for compensation because the case would be one of tort and a petition of right lies only in cases of contract and no action would lie against the officers enforcing the orders of the Crown because the acts of the officers would be in obedience to the lawful order of the Crown.

Mr. Herman Cohen puts together the possible and probable references to a legal profession in the literature of England between 1107—1413.

In the *Juridical Review* for March (1916) Mr. Brodie-Jones points out some of the outstanding differences between English and Scots law of contracts. The most important difference of course, is that whereas under the English Law consideration is an essential incident of every contract, under the Scots Law it is not. In Scotland certain contracts require to be in writing but it is open to a party in certain cases even though there is no writing to call upon the other side to deny by his oath the existence of such a contract and if he fails to take the oath, to prove it *aliunde*. But it is open to the courts in their discretion, not to call on the other party to take oath. Under the Scotch practice, written obligations can be registered in court with the consent of the party bound and in the event default execution will issue. Sealing to which so much sacredness is attached in England was dispensed with in Scotland so early as 1584 but two witnesses are necessary for every Scotch deed.

In the same Review, for June Mr. Henry Brown reviews the important Scotch cases of the last century on insanity in relation to crime and lays down the two following propositions as deducible from them.

1. An accused person is entitled to be acquitted on the ground of insanity if it is proved to the satisfaction of the jury that at the time when he committed the criminal act charged he was suffering from an absolute alienation of reason so that

(*a*) he did not know the nature and quality of the act which he was doing ;

(*b*) if he knew its nature and quality he did not know that he was doing what was wrong ; or,

(*c*) if he knew both the nature of the act and that it was wrong, he did not possess will power sufficient to enable him to control his impulse to do it.

2. A person accused of murder may be convicted of the less grave charge of culpable homicide if it is proved to the satisfaction of the jury that at the time when he committed the criminal act he was suffering from unsoundness of mind which did not amount to an absolute alienation of reason.

In the *Canadian Law Times* for September, Professor Edwin Maxey of the University of Nebraska demonstrates the utter illegality internationally of the announcement of Germany and Austria that they would sink without warning all armed merchant vessels of their enemies. A new invention cannot absolve them from the duty imposed by international law of warning before sinking; nor is the fact that submarines cannot sink armed merchant men a ground for taking away the recognised right of merchantmen to arm themselves for purposes of defence. The writer rightly says that if neutral lives are lost by their disregard of the precautions required by the international law, the neutral countries involved are justified in breaking off communications with the erring country.

BOOK REVIEWS.

THE STAMP ACT II OF 1899 WITH NOTES *by K. Jagannadha Aiyar, Third Edition,* 1916.

The legal profession in this country has been for some years looking out for this edition of Mr. Jagannadha Aiyar's well known Commentaries on the Stamp Act. The book under review is one of the very few publications on Stamp Law which give the reader a comprehensive view of the subject and does not stop with giving a bead roll of cases decided under each section of the Act. Analogies of English decisions are frequently invoked and the whole subject has been dealt with from the treatise writer's point of view. Mr. Jagannadha Aiyar's authority on questions of Indian Stamp Law is very high and we have no doubt his expression of opinion on questions not covered by authority will command great respect. There are several appendices to the work containing the prior enactments relating to stamps, the English Statutes on the subject and a large variety of other useful and valuable information. We cannot complete the review of this work without saying that this is a work indispensable to all having to do with questions of stamp.

THE INDIAN DECISIONS (*Old Series*) *Vol.* 17, *Law Printing House, Madras.*

We have great pleasure in announcing the publication of the 17th Volume of the Series which Reprints Part I of Vol. 14 of the Bengal Sudder Dewani Adawlut Reports.